

Hulas Rai Baij Nath

Vs

Firm K. B. Bass & Co.

Civil Appeal No. 897 of 1964

(R. S. Bachawat, J. M. Shelat, V. Bhargava JJ)

03.05.1967

JUDGMENT

BHARGAVA, J.

The respondent firm, K. B. Bass & Co., instituted a suit on 13th April, 1951, for rendition of accounts against the appellant firm, Messrs. Hulas Rai Baij Nath, alleging that the appellant was, the commission agent of the respondent and that the accounts between respondent as the principal and appellant as the agent had not been settled since the dealings began in the year 1941 onwards. Tentatively, a sum of Rs. 2,100/- was claimed in the plaint. In the written statement filed on behalf of the appellant, the suit was contested on various grounds; but for the purposes of this appeal, we need mention the pleas taken in only two paragraphs 8 and 112. In paragraph 8, it was pleaded that one Lala Shiva Charan, a partner of the respondent firm, had come with a Munim in the month of Agahan last and accounts were fully explained to him as worked out up to Kartik Sudi 15, Sambat 2007. In that statement of account, a sum of Rs. 120,677-124-3 was found due to the appellant from the respondent and the representatives of the respondent asked for two months' time for making the payment of the amount found due. It was thus urged that there was no occasion for rendition of accounts and the plaintiff's suit was not fit to proceed according to law. In paragraph 11, the appellant pleaded that "if, in the opinion of the court, the court had jurisdiction to try the suit and it is necessary to render the accounts, it is equitable that a decree for the amount which may be found due to the contesting defendant, after rendition of accounts, together with costs and interest be passed in favour of the contesting defendant after necessary court-fee being realized from the defendant. " A number of issues were framed and the case was taken up for recording of evidence on several dates of hearing. Some of the issues were even given up during the trial. Ultimately on 5th May 1953, after a considerable amount of evidence had been recorded, an application was presented on behalf of the plaintiff-respondent for withdrawal of the suit. The ground given for withdrawal was that the respondent firm was in the charges of one who had colluded with the and was going on between the respondent and Bhagwat Charan for effecting partition of the business. Consequently, it was difficult to prosecute the suit. No prayer was made for permission to file a fresh suit. The application objecting to this application for withdrawal. The main ground taken for contesting this application for withdrawal was that, in a suit of this nature, it is permissible to pass a decree in favour of the defendant if, on accounting something is found due to him against the plaintiff, and it followed that, if the defendant paid court-fee on the amount which was found due to him from plaintiff, his position became that of a plaintiff himself and he became entitled to have the accounting done and to obtain a decree. It was urged that the plaintiff's game in withdrawing the suit after protracted duration and considerable expenditure on the part of the defendant was to defeat this right of the defendant. The trial Court held that the right of the plaintiff in this suit to withdraw under O. 23 r. 1 of the Code of Civil Procedure was inherent and such a right could be exercised at

any time before judgment. All that the defendant could claim was an order for costs in his favour. The Court, therefore, dismissed, the suit, awarding costs of the suit to the appellant. The appellant filed a revision in the High Court of Allahabad against this order, with a prayer that the High Court may set aside the order of the trial Court and remand the suit for trial according to law. The High Court dismissed the application for revision; and the appellant has now come up to this Court in this appeal by special leave.

The short question that, in these circumstances, falls for decision is whether the respondent was entitled to withdraw from the suit and have it dismissed by the application dated 5th May, 1953 at the stage when issues had been framed and some evidence had been recorded, but no preliminary decree for rendition of accounts had yet been passed. The language of O. 23, r. 1. sub-r (1); C. P. C. gives an unqualified right to a plaintiff to withdraw from a suit and, if no permission to file a fresh suit is sought under sub-r(2) of that Rule, the plaintiff becomes liable for such costs as the Court may award and becomes precluded from instituting any fresh suit in respect of that subject-matter under sub-r. (3) of that Rule. There is no provision in the Code of Civil procedure which requires the Court to refuse permission to withdraw the suit in such circumstances and to compel the plaintiff to proceed with it. It is, of course, possible that different considerations may arise when a set-off may have been claimed under O. 8 C. P. C., or a counter-claim may have been filed, if permissible by the procedural law applicable to the proceedings governing the suit. In the present case, the pleadings in paragraphs 8 and 11 of the written statement, mentioned above, clearly did not amount to a claim for set-off. Further, there could be no counter-claim, because no provision is shown under which a counter-claim could have been filed in the trial Court in such a suit. There is also the circumstances that the application for withdrawal was moved at a stage when no preliminary decree had been passed for rendition of account and, in fact, the appellant still contending there could be no rendition of accounts as the suit because accounts had already been settled. Even in para 11, the only claim put forward was that, in case the Court heard it necessary to direct rendition of accounts and any amount is found due to the appellant, a decree may be passed in favour of the appellant for that amount. In this paragraph also the right claimed by the appellant was a contingent right, which did not exist at the time when the written statement was filed. Even if it be assumed that the appellant could have claimed a decree for the amount due to him after rendition of accounts, no such right can possibly be held to exist before the Court passed a preliminary decree for rendition of accounts. It is to be noted that in the case of a suit between principal and agent, it is the principal alone who has normally the right to claim rendition of accounts from the agent. The agent cannot ordinarily claim a decree for rendition of accounts from the principal and, in fact, in the suit, the appellant, who was the agent of the respondent, did not claim any rendition of accounts from the respondent. In these circumstances, at the stage of withdrawal of the suit, no vested right in favour of the appellant had come into existence and there was no ground on which the Court could refuse to allow withdrawal of the suit. It is unnecessary for us to express any opinion as to whether a Court is bound to allow withdrawal of a suit to a plaintiff after some vested right may have accrued in the suit in favour of the defendant. On the facts of this case, it is clear that the right of the plaintiff to withdraw the suit was not at all affected by any vested right existing in favour of the appellant and, consequently, the order passed by the trial Court was perfectly justified.

On behalf of the appellant, reliance was placed on the views expressed by a Division Bench of the Madras High Court in *Seethai Achi v. Meyappa Chettiar and Others*(1), where the Court held :

"Ordinarily, when the Court finds no impediment to the dismissal of a suit after the announcement of the withdrawal of the claim by the plaintiff, it will simply say that the suit is dismissed as the plaintiff has withdrawn from it. An order as to costs will

also be passed. But several exceptions have been recognised to this general rule. In suits for partition, if a preliminary decree is passed declaring and defining the shares of the several parties, the suit will not be dismissed by reason of any subsequent withdrawal by the plaintiff for the obvious reason that the right declared in favour of the defendants under the preliminary decree would be rendered accounts, where the defendants too may be entitled to some reliefs in their favour as a result of the settlement of accounts, the withdrawal of the suit by the plaintiff cannot end in the mere dismissal of the suit."

We do not think, as urged by learned counsel, that the learned Judges of the Madras High Court were laying down the principle that, in a suit for accounts, a defendant is always entitled to relief in his favour and that the withdrawal of such a suit by the plaintiff cannot be permitted to terminate the suit. In the context in which that Court expressed its opinion about suits for accounts, it clearly intended to lay down that the dismissal of the suit on plaintiff's withdrawal is not to be necessarily permitted, if the defendant has become entitled to a relief in his favour. But such a right, if at all, can in no circumstances be held to accrue before a preliminary decree, for rendition of accounts passed. In fact, in mentioning suits for partition and suits for accounts, the Court was keeping in view the circumstance mentioned in the earlier sentence which envisaged that a preliminary decree had already been passed defining rights of parties. In any case, we do not think that any defendant in a suit for rendition of accounts can insist that the plaintiff must be compelled to proceed with the suit at such a stage as the one at which the respondent in the present case applied for withdrawal of the suit.

The appeal, therefore, fails and is dismissed with costs.

Y. P.

Appeal dismissed.

</html